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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 805

THOMAS ROBINSON and ELAINE ROBINSON,
Appellants,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners, Thomas Robinson and Elaine Robinson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 23, 1959 which, by a divided court, reversed a judgment of the Tax Court in favor of the appellants.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix B hereto annexed, infra, p. 1b, and is reported at 273 F. 2d 503.

Jurisdiction

The judgment of the Court of Appeals was entered on December 23, 1959. Jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

Question Presented

Whether that part of the cost and expenses necessarily incurred by the co-owners in the operation of a resort hotel, lodge and guest house and which can be attributed to furnishing meals and lodging to such co-owners was properly deducted in determining the income of such co-owners subject to Federal Income Taxes.

Statutes and Regulations Involved

The statutes and regulations involved are set forth in Appendix A, infra, p. 1a.

Statement of the Case

The taxpayers, husband and wife, were co-owners and operators during 1953 of a lodge and guest ranch under the name of Twin Pine Lodge and Guest Ranch, seven miles west of Stroudsburg, Pennsylvania. All their income for 1953 was derived from that business. During the year 1953, except for the months of January and December while the taxpayers were on vacation, the taxpayers lived in an apartment which they had built onto the main resort building, but which was with-

out a door connecting with that building. The apartment, which was built at a cost of approximately $3,500 was built by the taxpayers for their personal use. Most of the furnishings in the apartment had been acquired by them before they entered into the resort business about 1938. They took no deduction on their income tax return for 1953 for depreciation of the apartment structure or the furnishings therein.

Except for the two months the taxpayers were on vacation, they gave their full time and attention to the operation of the resort in 1953. Prior to the opening of the resort for the year, the taxpayers were engaged in making preparations for reopening.

During 1953 the resort was opened for business about eight-and-half-months or exactly 257 days. During those days, guests were served three meals a day. On each of these days, the taxpayers together averaged eating a total of five meals at the resort hotel. A total of 29,766 meals was served in the resort during 1953 to guests and employees and to taxpayers. It was necessary in the operation of the resort that the two taxpayers live there and eat the meals in the resort which they actually ate there during 1953. (Opinion, infra, p. 2b.)

Other meals eaten by the taxpayers when the resort was open for business, and meals eaten by them when the resort was not open, were either eaten in outside restaurants or when eaten in their apartment such meals were prepared with food purchased by the taxpayers. Neither the cost of the taxpayers' meals in restaurants nor the cost of food eaten in the apartment was included in the cost of food in the operation of the resort or deducted by the taxpayers in their income tax return.

In their joint income tax return, the taxpayers took deductions, among others, for the following items in the indicated amounts as costs or expenses incurred in the operation of the resort in that year:

Food	$14,156.00
Insurance	1,592.32
Fuel	1,090.68
Electricity	1,054.06
Laundry	456.12
Telephone	390.74

The foregoing amounts included the cost of the food consumed by the taxpayers in the resort; the cost of insurance on the taxpayers' apartment; the cost of heating and electricity for the apartment; the cost of a small amount of cleaning and laundry for the taxpayers; and the taxpayers' use of the telephone at the resort for personal purposes.

The Commissioner issued a Notice of Deficiency disallowing part of the deductions claimed for operating costs and expenses in the amount of $1,200 on the ground that such part was attributable to the taxpayers' meals, laundry and other personal and family living expenses.

The Tax Court relied on its decisions in *Everett Doak*, 24 T. C. 569 and *Richard E. Moran* (14 CCH Tax Court Memo. 813 (1955)), and held that these items were deductible as a part of the business expenses. The Tax Court was of the opinion that the *Doak* and *Moran* cases were correctly decided by it notwithstanding the fact that both decisions had been reversed on appeal. *Commissioner* v. *Doak*, 234 F. 2d 704 (C. A. 4, 1956); *Commissioner* v. *Moran*, 236

F. 2d 595 (C. A. 8, 1956). While six Tax Court judges dissented in the instant case from the opinion of the majority, three of them did so because they felt constrained to follow the decisions of the appellate courts.

Decision of the Court of Appeals

The Commissioner filed a petition for a review of the decision of the Tax Court to the United States Court of Appeals for the Third Circuit. The Court of Appeals, by a divided court, reversed the judgment of the Tax Court holding that the expenses incurred were personal in nature and therefore not deductible. (Opinion, infra, p. 1b) (Judgment, infra, p. 16b) Circuit Judge McLaughlin wrote a dissenting opinion and voted to affirm the decision of the Tax Court. (Opinion, infra, p. 6b)

Reasons for Granting the Writ

I. This case presents important questions both as a matter of right and legislative grace relating to the equitable administration of the tax laws which should be decided by this Court.

II. The decision below, by a divided court, reversed a finding of the Tax Court to the effect that the expenses here involved were business in nature, although there is no finding that such determination was "clearly erroneous." F. R. C. P. 52(a) The decision here of the Tax Court was in accord with a long line of determinations by that Court (*Everett Doak*, 24 T. C. 569; *Richard E. Moran*, 14 CCH Tax Memo. 813 (1955); *Leo B. Wolfe*, 14 T. C. M. 791; *Matter of Papineau*,

16 T. C. 130). There were dissents in the Court of Appeals both in the leading case on this subject (*Commissioner* v. *Doak*, 234 F. 2d 704, CA 4th, Chief Judge Parker) and in the instant case (Circuit Judge McLaughlin).

POINT I

This case presents important questions relating to the equitable administration of the tax laws which should be decided by this Court.

The determination of the Court of Appeals in reversing the Tax Court is in conflict with the provisions of the 16th Amendment to the Constitution of the United States and contrary to the principles established in a long line of cases in this Court as to the nature of income and the taxability of the same as determined by its source and the proper exclusions therefrom. The effect of the judgment below is to deprive the appellants here of privileges to which they are entitled to both as a matter of right and as a matter of legislative grace. Circuit Judge McLaughlin in his dissent below aptly stated that he does not think the problem here involved "is as cut and dried as it appears to the majority" and it is apparent from an analysis of the majority opinion that it was reached with considerably more ease than persuasiveness.

A. The Amount Expended for Meals and Lodging is a Proper Exclusion in Computing "Income" within the meaning of the 16th Amendment to the Constitution.

The present era of the income tax laws in the United States commenced with the adoption in 1913

of the 16th Amendment to the Constitution of the United States which provides:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."

After the adoption of the foregoing amendment, the question of the meaning of the term "income" as used in the provision was brought in question before this Court in the classic case of *Eisner* v. *Macomber*, 252 U. S. 189 (1919) where the question involved was whether stock dividends constituted income, and at pages 206-207, Mr. Justice Pitney stated:

> "* * * For the present purpose we require only a clear definition of the term 'income,' as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.
>
> "After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case* (pp. 183, 195)."

Under this definition there are two main principles: in order to be "income," there must be (1) a gain and it must be (2) derived from the specified sources.

Again, in the case of *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, this question was before this Court and at page 185, Mr. Justice Pitney stated:

> "* * * Whatever difficulty there may be about a precise and scientific definition of 'income,' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities."

In *Doyle* v. *Mitchell Bros. Co., supra*, the plaintiff lumber company had purchased timber land in 1903 at $20 per acre, and on December 31, 1908 its value was $40 an acre. In computing its net income tax for the years 1909 through 1912 for the purpose of the Corporation Excise Tax Act, the corporation deducted from its gross income the December 31, 1908 value of the stumpage cut. The Commissioner reduced the deduction to the 1903 cost. This Court held for the plaintiff saying in part at page 185:

> "* * * In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration."

See also *Burnett* v. *Logan*, 283 U. S. 404, 413.

In the instant case the Tax Court found, and the Court of Appeals concurred, that it was necessary in the operation of the resort that the two taxpayers live

there and eat their meals in the resort which they actually ate during the period 1953. (Opinion, infra, p. 2b.) The co-owners here purchased at the market foodstuff in order to operate. Part of the foodstuff was consumed by the guests, part by employees and part necessarily by the owners. All were necessarily consumed in the operation of the business and are directly connected with the production of the gross sales of the business. In a case such as this to determine net income it is necessary to start with the gross amount of sales and only so much thereof as constitutes "gain" is income. First, to compute such "gain" there must be deducted the cost of producing the sales to arrive at income and second, to compute taxable net income there must be subtracted such further deductions as are authorized by statute.[1] The taxpayer's right in the first step rests on the Constitution and it can not be abridged or conditioned by Congress. The Commissioner's action here and the decision of the Court of Appeals deny to the appellants the right to exclude one of such costs of producing the sales. The cost of providing meals and lodging of the appellants here was a return to the business of capital, not income at all, and therefore is free from the tax. That which is not in fact income can not be made such by administrative fiat nor "be reflected into income by any mirrors of accounting."[2] The Congress itself does not have the power to abridge or condition this right and the courts should not be permitted to do so by judicial interpretation.

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[1] *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179; Holmes, Federal Taxes, Sixth Edition, p. 506; Haden, Fundamentals of Federal Taxation, p. 30; Taxable Income, Magill (1945) p. 359.

[2] Matter of Papineau, 16 T. C. 130, 132.

B. Congress as a Matter of Legislative Grace has also Provided for the Allowance of These Expenses (Sec. 23(a)(1) I. R. C. 1939)

Not only are the appellants here entitled to an allowance for these expenditures as a matter of right, but their allowance is also provided for in the Internal Revenue Code of 1939 as a matter of legislative grace. Section 23(a)(1) of the Code provides that "all of the ordinary and necessary expenses paid or incurred" in carrying on any trade or business are to be allowed as deductions in computing net income. The Congress intended that Section 23(a)(1) be at least co-extensive with the requirements of the Constitution on questions dependent upon the source. Indeed, in other respects the section goes beyond such requirements, and it is for this reason that there has been a dearth of authorities on the questions now before this Court.

The Tax Court held these expenses to be deductible as business expenses and it was error for the Court of Appeals, by a divided court, to disturb such finding. The basic underlying general problem of meals and lodging involves the question of "gain," if any. The basic problem of "gain" in this type of case has two inseparable subdivisions, namely, "owner's gain" (gross amount of sales, minus exclusions and deductions) and "employee's gain" (wages plus meals, etc. if compensatory). Since the cost of furnishing meals and lodging to the employee is admittedly a business expense, then it necessarily follows that the same cost in the related subdivision of this general problem involving owners is also a business expense under the statute. The nature of the expense cannot change because of a change in the recipient involved. (Section 23(a)(1))

C. Decision in the Court of Appeals

The Appellate Courts by their own admissions, have had considerable difficulty with the problem here involved and that is because in reaching their decisions they erroneously considered the "convenience of the employer" rule (Section 119 I. R. C.) and held that owners did not come within that rule although no such contention had been made. They ignored completely the fundamental considerations underlying both the rule and the statute. As we have seen, the basic question is whether there was a "gain" and that question subdivides into the related questions of (1) employee's gain and (2) owner's gain. Clearly each subdivision stands by itself and one can not be tested by applying the other. The characteristics of both, however, can be compared by relating them to the underlying basic problem of "gain". The appeal courts have completely ignored the fact that the rule and the statute were based upon fundamental decisional law involving basic rights as set forth above and instead have predicated their opinions on the statute and regulations which at best are but a partial formalization or codification of such law.

The court below in this case quoted in full Section 119 in a footnote to its opinion and also quoted Section 39.22(a)(3) of the Regulations issued under the 1939 Code, and it reasoned that since owners were not specifically referred to in these sections, there was no basis for the deductions claimed here. (Opinion, infra, p. 4b.) This does not necessarily follow. Because the section is limited to employees does not mean that owners are not entitled to exclusions as a matter of

right.[1] Indeed Section 119 on its face supports this statement for it confirms the constitutional principle that there must be an exclusion of such meals and lodging in determining gross income. If the items were within the meaning of the word "income" then Congress undoubtedly would have provided for a deduction rather than an exclusion. Moreover, even the regulations quoted by the Court[2] distinguishes between a situation where an employee is paid wages *and* living quarters together with meals *as his compensation* and the situation in which he is paid wages *to live upon the premises.*[3] In the first, the additional items are intended to be compensation; in the latter, they are for the convenience and are not income or additional compensation.

The Court of Claims in this connection has held that the rental value of quarters furnished to an army officer is not income to him on the grounds that the quarters are furnished for the convenience of the government and that in any event the saving is not income.[3] In that case the Court held that the army officer did not receive as compensation salary plus quarters but was rather paid his salary to live upon the premises. It was part of his vocation. The critical distinction, therefore, is whether or not the furnishing of meals and lodging constitutes gain or compensation and ultimately income subject to tax on "income". Section 119 and Section 39.22(a)-3 are no more than partial restatements of the fundamental principle requiring a "gain" in order for there to be income and once that principle is recognized

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[1] Cf. *Commissioner* v. *Moran*, 236 F. 2d 595, 597.

[2] Section 39.22(a)-3, Appendix p. 2a.

[3] *Jones* v. *United States*, 60 Ct. Cls. 552 (1925).

the regulation and the statute cannot be construed so as to foreclose an allowance to an owner solely because they do not specifically refer to such owner. These provisions bear upon the question of compensation; the owner or partner cannot compensate himself, and obviously there would be no purpose or sense in incorporating him within such provision in such regulation or statute. Furthermore, insofar as owners and partners are concerned, as we have seen above, Congress has in addition provided for the allowance of these expenses as a matter of legislative grace when incurred in connection with a business. (Sec. 23(a)(1) I. R. C. 1939)

The same basic principle of the requirement of a gain is applicable where the meals and lodging are taken by an owner for the same reasons that he would have furnished them to an employee, namely as a necessary function in carrying on the business. As pointed out above, the necessity for taking such meals and lodging on the premises was specifically recognized by the Court of Appeals in its opinion. In fact, the opinion went further in pointing out that if the taxpayers had hired a resident manager to do the same work, his salary would have been an appropriate business expense and the meals and lodging furnished to him would not be taxable. Even further the opinion pointed out that if the taxpayers formed a corporation and did the same work themselves, the meals and lodging would not be taxable. This was a clear recognition that the meals and lodging were an essential factor in the production of income.

Notwithstanding this finding, the majority opinion of the Court of Appeals then went off on a tangent to

find that the expense of the meals and lodging was a personal expense on the false analogy that many taxpayers had similar expenses which were of a personal nature. What the Court of Appeals overlooked completely is the basic question of determination of income; that where the expense is an integral part of the cost of producing the income, it must be excluded from gross sales before there can be any income constitutionally subject to tax. It is untenable to argue that Congress limited this Constitutional principle by specifying a deduction in the case of an employee and implying that no deduction can be allowed in the case of an owner.

In addition to overlooking the Constitutional point involved, the majority opinion of the Court of Appeals made an erroneous analogy between the present situation and the situation where taxpayers spend money for carfare to arrive at their places of business and for their lunches while there. Even textbook writers recognize the distinction between the two situations.[1] In the case of the owner, such as here, meals and lodging are furnished to him to further the interest of the business with the resulting increase in gain to the business and ultimately income subject to income taxes. In the case of the salaried employee, his carfares do not so contribute because he has started to work only after reaching his place of business. If he lunches in town because he lives too far to go home, the cost is personal and is not in connection with his employment. "The exigencies of business rather than the personal conveniences and necessities of the traveller

[1] Fundamentals of Federal Taxation, Haden (1959), p. 39.

must be the motivating factors".[1] The expenses here were incurred in furtherance of the business, to produce the gross sales, and at their source they were necessitated by the needs of the business. Only by the allowance of these expenses as exclusions or deductions can consistency be achieved between the provisions of the Constitution, the statutory enactments of Congress and Court decisions in cases of this nature.

In the *Doak* case, *supra,* the majority opinion of the Court of Appeals for the Fourth Circuit, indicated its failure to comprehend the problem here involved when it stated that the analogy used by the Tax Court in the *Papineau* case was an "unhappy one" where it was to the effect that a hotel manager was in a position similar to the captain of an ocean liner. As a factual matter, there may be some differences in the two situations. However, as a matter of law they are quite similar in that in both cases there can be no gain to the individuals. Further, what appears on its face to be savings to the captain, if taxable, might be more apparent than real. For example, a bachelor captain (or owner) required to be on duty 24 hours a day might much prefer to live at home with his parents at no cost to himself. In such a case, there might be neither gain, saving or benefit.[2]

It is the contention of the appellants here that their expenditures for meals and lodging can not be disallowed solely because they do not fall within the limited wording of a rule, regulation or statute specifically applicable only to an "employee". They further contend that in order to have taxable income there must

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[1] *Commissioner* v. *Flowers,* 326 U. S. 465, 474.

[2] *Tennant* v. *Smith* (1892) A. C. 150.

be a gain and to comput such gain they must be allowed their expenses incurred in arriving at the gain. Here the owners went out and purchased the foodstuff which was consumed by their guests, their employees and themselves, all with the purpose of and in connection with obtaining a business gain. If the amount of these expenses is not taxable to employees, and their employers are permitted to deduct the cost of such items as business expenses, it follows that such related expenses necessarily incurred in connection with business purposes by the owner must also be of a business nature and deductible under Section 23(a)(1) of the Internal Revenue Code. The two problems as we have seen are related subdivisions of the same general problem and are not distinguishable as to their nature. The appellants, therefore, are entitled to an exclusion of their cost from gross income as a matter of right or a deduction of their cost as a matter of legislative grace.

Section 24(a)(1) prohibits the deduction of personal living expenses but is not applicable to the situation here since these are business expenses, and if it were applicable it would, on these facts, run contrary to the provisions of the 16th Amendment as outlined above.

POINT II

The decision below, by a divided court, reversed a finding of the Tax Court to the effect that the expenses here involved were business in nature although there was no finding that the determination was "clearly erroneous."

The Tax Court is a specialized, highly skilled court dealing solely with tax matters and its findings are en-

titled to great weight. In the instant case, the finding by the Tax Court was based upon oral testimony of the taxpayers, and the Tax Court was in the best position to weigh the credibility of the witnesses and determine the facts. The appellate courts should not and may not reverse the findings of fact by the Tax Court unless they find them to be "clearly erroneous". FRCP 52(a) There was no such finding below. *Commission* v. *Pope*, 239 F. 2d 881, 883 (C. A. 1, 1957); *Randall Foundation* v. *Riddle*, 244 F. 2d 803, 805 (C. A. 9, 1957); *U. S.* v. *Hover*, 268 F. 2d 657, 665 (1959).

Accounting problems, such as are involved here, have been held to be questions of fact by this Court in *Dobson* v. *Commissioner*, 320 U. S. 489, 504.

Conclusion

For the reasons stated above, appellants pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment.

Respectfully submitted,

CHARLES W. MERRITT
Counsel for Appellants

Dated: March 18, 1959

APPENDIX A

Statutes and Regulations Involved

28 U. S. C. A. 1254 (1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

INTERNAL REVENUE CODE OF 1939

SECTION 23(a)(1)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

SECTION 24(a)(1)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [as amended by Sec. 127(b) of the Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

SECTION 39.22(a)(3) OF REGULATIONS UNDER 1939 I. R. C.

§ 39.22(a)-3 *Compensation paid other than in cash* . . . . If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. Treas. Reg. 118, § 39.22(a)-3.

INTERNAL REVENUE CODE OF 1954

SECTION 119

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52(a)

Rule 52. Findings by the Court

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

APPENDIX B

Opinion of the Court of Appeals, Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,940.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner
v.
THOMAS ROBINSON AND ELAINE ROBINSON,
Respondents

PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued November 17, 1959

Before:

BIGGS, *Chief Judge*, and GOODRICH and McLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT

(Filed December 23, 1959)

By GOODRICH, *Circuit Judge*.

This is an income tax case concerning the income of the taxpayers for the year 1953. The taxpayers won before the Tax Court, 31 T.C. No. 9 (Oct. 13, 1958), and the Commissioner appeals.

The problem involved is one which has now become familiar in the various Courts of Appeals. There is no dispute on the facts. The taxpayers (husband and wife) own and operate a resort hotel in the Pocono Mountains not far from Stroudsburg, Pennsylvania. For about ten months of the year they live on the premises. They occupy living quarters in a dwelling attached to the main building of the hotel but not opening into it. During the period when there are guests, taxpayers eat their meals in the hotel dining room. It is necessary in the operation of the hotel by the taxpayers that they live on the premises and eat in the hotel dining room.

On their joint return for 1953 the taxpayers took deductions for items incurred in the operation of their enterprise which included amounts attributable to the cost of the food which they consumed, insurance on their apartment, heating and lighting for the apartment, personal telephone calls and a small amount of personal cleaning and laundry. The Commissioner, asserting that these amounts were nondeductible personal expenses, disallowed deductions in the amount of $1,200. The majority of the Tax Court, following a line of cases decided by that body,[1] decided in favor of the taxpayers.

The case arises under the 1939 Internal Revenue Code. Section 24(a)(1) provides that "no deduction shall *in any case* be allowed in respect of—(1) Personal, living, or family expenses. . . ." (emphasis added).

[1] George A. Papineau, 16 T. C. 130 (1951); *non-acq.*, 1952-2 CUM. BULL. 5; Everett Doak, 24 T. C. 569 (1955), *rev'd* 234 F. 2d 704 (4th Cir. 1956); Richard E. Moran, 14 CCH Tax Ct. Mem. 813 (1955), *rev'd* 236 F. 2d 595 (8th Cir. 1956).

The argument for the taxpayers is that the expenses in question are not "personal" expenses but are business expenses and, therefore, properly deductible under Section 23(a)(1)(A) of the 1939 Code.[2]

The decision of the Tax Court's majority constituted a somewhat obdurate adherence to its previous decisions in spite of three Courts of Appeals decisions to the contrary. The first of these was a Fourth Circuit case decided in 1956, *Commissioner* v. *Doak*, 234 F. 2d 704. Judge Dobie wrote the majority opinion; Chief Judge Parker dissented. The considerations on each side of the question are very competently and fully set out there. The next case was in the Eighth Circuit, also in 1956, *Commissioner* v. *Moran*, 236 F. 2d 595. There, again, the merits were discussed. The third case was in the Tenth Circuit, again in 1956, *United States* v. *Briggs*, 238 F. 2d 53. The court there, in a per curiam, was content to cite and follow the *Doak* and the *Moran* decisions.

Even if this were an original question, we would have no desire to reach a conclusion other than that reached in the three cases just cited. The "conven-

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[2] "§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or business expenses.

"(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business of property to which the taxpayer has not taken or is not taking title or in which he has no equity . . ."

ience of employer" rule[3] has no application here. A partnership is not an employer of the partners. It makes a return[4] but the individual partners in their own personal returns account for their distributive shares of net income and net loss.[5]

> "Payments made to a partner for services rendered and for interest on capital contributions are not deductible in computing the net income of the partnership, such payments being held to represent a division of partnership profits." Treas. Reg. 118, § 39.183-1(b).

It is true, obviously, that these taxpayers incurred expenses while on the premises in the operation of

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[3] Under the 1939 Code this rule appeared in a Treasury regulation.

"§ 39.22(a)-3 *Compensation paid other than in cash* . . . If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. . . ." Treas. Reg. 118, § 39.22(a)-3.

Congress enacted the rule into the 1954 Code.

"§ 119. Meals or lodging furnished for the convenience of the employer

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

"(1) in the case of meals, the meals are furnished on the business premises of the employer, or

"(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." INT. REV. CODE OF 1954, § 119.

[4] Int. Rev. Code of 1939, § 187.

[5] Int. Rev. Code of 1939, §§ 181, 182.

business; expenses for food, light, heat and so on. But the millions of taxpayers in this country who spend money for carfare, lunches and clothes each day, in order that they may arrive at their places of business and be fit to carry it on, cannot deduct what they pay the bus company, the restaurant proprietor and the clothing merchant for their transportation, food and clothes. Each incurs personal expenses in order that he may carry on his business enterprise, whatever it may be. These taxpayers are in the same situation.

No doubt if the taxpayers hired a resident manager they could deduct a proper allowance of salary for him and he would not be compelled to pay taxes on the value of his food and lodging under the "convenience of employer" rule; and if the taxpayers formed a corporation and were hired by the corporation to live and work on the premises the same would be true. But if their choice is to do this work of management themselves, and to work as a partnership rather than for a corporation, they cannot take deductions for personal expenses just as the thousands of commuters, who come into the cities each day and go out each night, cannot deduct such items.

The taxpayers also complain about the amount disallowed. But it is presumed that the Commissioner's figure is correct and there is nothing in the evidence in this case to overthrow that presumption.

The judgment of the Tax Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

McLAUGHLIN, *Circuit Judge*, dissenting.

I do not think the problem before us is as cut and dried as it appears to the majority.

In Commissioner v. Doak, 234 F.2d 704 (4 Cir. 1956), Commissioner v. Moran, 236 F.2d 595 (8 Cir. 1956) and in the case now before us, the Commissioner conceded the expenses were necessary. The sole remaining question then is "whether these expenses were predominantly personal or business in nature." Commissioner v. Doak, supra, at 706.

The fact that similar expenses are incurred by other taxpayers does not automatically dispose of the issue. Even the Moran case admits this, saying "It is true that certain expenses normally personal may become deductible by reason of intimate relation to an occupation carried on away from home or partially away from the principal place of doing business, *but this is so because of the predominant business characteristics of the expense*." Commissioner v. Moran, supra, at 597. (Emphasis supplied). It would appear that in this area each case should be decided on its facts rather than be forced, meritorious or not, under a blanket prohibition as a matter of expediency.

Again in the Doak and Moran cases, and in the majority opinion here, it is conceded that the very same expenses would be deductible if the taxpayers were employees of another or, if they had incorporated their business, under the "convenience of employer" rule. This is nothing more than penalizing the self-employed.

unincorporated business man. The above concessions imply that the expenses are predominantly business in nature. They therefore should be deductible irrespective of the form of business or status of the taxpayer. As the late Chief Judge Parker stated in his dissenting opinion in Doak, "There is no reason why the value of such meals should be considered as income and as the personal expense of the taxpayer merely because he is self-employed in his own business rather than employed in the business of another."

I would affirm the decision of the Tax Court.

Opinion of the Tax Court

Findings of Fact and Opinion of the Tax Court

31 T. C. No. 9

TAX COURT OF THE UNITED STATES.

THOMAS ROBINSON and ELAINE ROBINSON, *Petitioners*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket No. 61744. Filed October 13, 1958.

The expenses of operation of a lodge and guest ranch should be computed without eliminating portions of the cost of food, insurance, fuel, electricity, laundry and telephone to represent the cost of meals and lodging furnished to an owner-operator of the lodge and ranch who lodged and ate therein not for his own personal convenience but because it was necessary in connection with the operation of the lodge and ranch.

Samuel M. Monatt, C. P. A., for the petitioners.

Paul D. Ritter, Esq., for the respondent.

WITHEY, *Judge:* The respondent has determined a deficiency of $241.16 in the petitioners' income tax for 1953. The only issue for decision is what portions, if any, of the deductions taken by petitioners in their income tax return for operating costs and expenses incurred in the operation of a lodge and guest ranch represented personal living expenses of the petitioners and therefore were not deductible.

FINDINGS OF FACT

The petitioners, who are husband and wife, have their residence and place of business at R. D. No. 2, Stroudsburg, Pennsylvania. They filed their joint individual income tax return for 1953 with the director at Scranton, Pennsylvania.

During 1953 the petitioners owned and operated a lodge and guest ranch 7 miles west of Stroudsburg under the name of Twin Pines Lodge and Guest Ranch, sometimes hereinafter referred to as the resort. All of their income for 1953 was derived from that business.

In addition to providing meals and lodging for their guests at the resort, the petitioners also maintained stables with from 30 to 40 horses for the guests' use.

The resort was closed during the months of January and December 1953. During those months the petitioners went away on vacation. During the remainder of the year the petitioners lived in an apartment which they had built onto the main resort building but which

was without a door connecting with that building. The apartment, which was built at a cost of approximately $3,500, was built by the petitioners for their personal use. Most of the furnishings in the apartment had been acquired by petitioners before they entered into the resort business about 1938. They took no deduction in their income tax return for 1953 for depreciation of the apartment structure or the furnishings therein.

Except for the 2 months the petitioners were on vacation they gave their full time and attention to the operation of the resort in 1953. Prior to opening the resort for the year the petitioners were engaged in making preparations for reopening.

During 1953 the resort was open for business about 8½ months or exactly 257 days. During those days, guests were served 3 meals a day. On each of those days the petitioners together averaged eating a total of 5 meals in the resort. Other meals eaten by the petitioners when the resort was open for business and meals eaten by them when the resort was not open were either eaten in restaurants or in their apartment where they were prepared from food purchased by petitioners. Neither the cost of petitioners' meals in restaurants nor the cost of food eaten in their apartment was included in the cost of food used in the operation of the resort and deducted by petitioners in their income tax return. A total of 29,766 meals was served in the resort during 1953 to guests and employees and to petitioners. It was necessary in the operation of the resort that the two petitioners live there and eat the meals in the resort which they actually ate there during 1953.

In their income tax return for 1953 the petitioners took deductions, among others, for the following items

in the indicated amounts as costs or expenses incurred in the operation of the resort during that year:

Food	$14,156.00
Insurance	1,592.32
Fuel	1,090.68
Electricity	1,054.06
Laundry	456.12
Telephone	390.74

The foregoing amounts included the cost of the food consumed by petitioners in the resort, the cost of insurance on petitioners' apartment, the cost of heat and electricity for the apartment, the cost of a small amount of laundry and cleaning for the petitioners and petitioners' use of the telephone at the resort for personal purposes.

In determining the deficiency in question the respondent disallowed an amount of $1,200 with the following explanation:

> The deductions claimed on your income tax return for the taxable year ended December 31, 1953 for operating costs and expenses have been disallowed in the amount of $1,200.00 for the costs attributable to your meals, lodging, and other personal and family living expenses.

OPINION.

Relying on our decisions in *Everett Doak*, 24 T. C. 569, and in *Richard E. Moran*, Docket No. 51184, an unpublished decision filed July 21, 1955, the petitioners contend that the respondent erred in determining that any portion of the deductions taken by them as costs and expenses of operating the resort represented their personal living expenses and consequently was not

allowable. The respondent contends that a portion of each of the deductions taken by petitioners for food, insurance, fuel, electricity, laundry and telephone represented personal expenses of the petitioners, that the total of such portions was $1,200 and that his disallowance of that amount was proper. In support of his contention he relies on *Commissioner* v. *Doak*, 234 F. 2d 704 (C. A. 4, 1956), and *Commissioner* v. *Moran*, 236 F. 2d 595 (C. A. 8, 1956), in which our decisions in the *Doak* and *Moran* cases, respectively, were reversed. The respondent also relies on *United States* v. *Briggs*, 238 F. 2d 53 (C. A. 10, 1956).

In *Everett Doak, supra*, the taxpayers, husband and wife, during 1950 owned and operated a hotel. They gave their full time and attention to the operation of the hotel in which they occupied rooms and ate most of their meals. It was necessary in the operation of the hotel that the taxpayers live and eat the meals in the hotel which they actually ate there during 1950. On authority of *George A. Papineau*, 16 T. C. 130, we held that the expenses of the hotel should be computed without eliminating portions of depreciation, cost of food, wages and general expenses to represent the cost of meals and lodging furnished to the taxpayers.

The taxpayer in the *Papineau* case was a member of a partnership which during 1944 operated a hotel. He was manager of the hotel and devoted all of his time to his duties in that capacity. Pursuant to an agreement with his partners, he lived in the hotel and took his meals there. That arrangement was essential in order to manage the hotel to the best advantage of the partnership at all hours of the day and night. The question presented there was whether all or any part of

the value of the meals and lodging which the taxpayer had at the hotel represented income to him. After considering the applicable portions of the Internal Revenue Code and the respondent's regulations relative thereto in connection with decisions regarded as pertinent to the question presented and after observing that the taxpayer was at the hotel, not for his own personal convenience and benefit so that his expenses were primarily living expenses, but to operate the hotel, we concluded that the taxpayer had no taxable income from the meals and lodging had by him at the hotel. In reaching that conclusion we said, among other things:

> It is in accordance with sections 22 and 23 of the Internal Revenue Code that the expenses of operation be computed without eliminating small portions of depreciation, cost of food, wages, and general expenses to represent the cost of his meals and lodging and that he be not taxed with the value of his meals and lodging. There may be other similar examples where the business features of a dual item outweigh its personal living expense aspects.

On appeal by respondent to the Court of Appeals for the Fourth Circuit, our holding in the *Doak* case was reversed by a divided court. The majority of the court were of the view that "The issue boils down to whether these expenses were predominantly personal or business in nature," and admitted that "such questions cause no little difficulty." After a consideration of the provisions of section 24(a)(1) of the Code, the provisions of respondent's regulations relative thereto, and certain decisions deemed pertinent, in connection with our holdings in the *Papineau* and *Doak* cases the court said:

> True it is, as has been pointed out previously, that the items here involved may be viewed, on the

one hand, as business expenses, on the other hand, as personal. We think their essential nature, their inherent and dominant attributes, characterize them as personal with a tinge of business and not as business with a personal tinge. And we see Section 24(a)(1) as an absolute blanket inclusion of these items in income, thereby prohibiting their deductibility, unless the federal statutes expressly and clearly provide to the contrary. There are no such statutes.

In a dissenting opinion in the *Doak* case, Chief Judge Parker expressed the view that our decision in the *Doak* case should be affirmed for the reasons stated therein and in the *Papineau* case. He further stated:

> The question involved is not one of deducting personal expenses from a tax return. It is whether deductions for the expense of operating the business should be decreased because the owner of the hotel eats and lodges at the hotel in connection with operating it. The Tax Court answered this question in the negative on the theory that meals and lodging incidental to carrying on a business are to be treated as an expense of the business rather than as a personal expense. It is on this theory that the statute excludes from gross income of an employee the value of meals furnished the employee whose presence is required on the premises. See section 119 of the Revenue Code of 1954. There is no reason why the value of such meals should be considered as income and as the personal expense of the taxpayer merely because he is self employed in his own business rather than employed in the business of another. The question involved is, strictly speaking, neither one of fact nor of law, but of the minor policy type involved in such matters as whether the owner of a dairy farm should decrease the deduction due to expense of operation because

he has consumed some of the milk produced by the dairy. These are just the sort of questions that the Tax Court, because of its wide experience in tax matters, is peculiarly competent to decide. I would not disturb its decision here, which is in accord with its decision in a number of other cases.

In *Richard E. Moran, supra,* the taxpayers, husband and wife, during 1949 and 1950 operated a hotel in partnership. They performed various duties at the hotel which required them to be present in the hotel at different times during both the day and night. They lived at the hotel and took their meals there of necessity and for the convenience and benefit of the business. On authority of our decision in *Everett Doak, supra,* we held that the respondent improperly eliminated the expense of such meals and lodging in computing the ordinary net income of the partnership and the taxpayers' distributive shares thereof.

On appeal by respondent of the *Moran* case to the Court of Appeals for the Eighth Circuit, that court followed the majority decision of the Court of Appeals for the Fourth Circuit in the *Doak* case and reversed our decision.

In *United States* v. *Briggs, supra,* the Court of Appeals for the Tenth Circuit in a per curiam opinion, and on authority of the majority opinion of the Court of Appeals for the Fourth Circuit in the *Doak* case and on authority of the decision of the Court of Appeals for the Eighth Circuit in the *Moran* case, reversed the United States District Court for the District of Colorado which had held that the living costs of a managing partner and of his family who was required under the partnership agreement to live at the hotel and manage

the same were deductible business expenses of the partnership under section 23(a)(1) of the Internal Revenue Code of 1939.

After carefully reconsidering the problem here presented in the light of the decisions of the Courts of Appeals for the Fourth, Eighth, and Tenth Circuits in the *Doak*, *Moran*, and *Briggs* cases, respectively, we are, with all due respect to those courts, unable to apply their decisions here since we are of the opinion that the *Papineau*, *Doak*, and *Moran* cases were correctly decided by us.[1]

Being of the opinion that the factual situation presented here falls within the purview of our decision in the *Doak* case, we hold for the petitioners.

Since the respondent made other determinations respecting the petitioners' tax liability which are not involved herein,

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, FISHER, and MULRONEY, *JJ.*, dissent.

RAUM, *J.*, dissenting: The issue is not free from doubt and several courts of appeals have passed upon it. I would follow their decisions.

PIERCE and ATKINS, *JJ.*, agree with this dissent.

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[1] In this case, unlike *Arthur L. Lawrence*, 27 T. C. 713, revd. on another issue ..... F. 2d ..... (June 25, 1958), the court of appeals for the circuit to which this case would normally go on appeal has not yet passed on the question here involved.

Judgment of the Court of Appeals, Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,940.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THOMAS ROBINSON and ELAINE ROBINSON,
Respondents.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present:

BIGGS, *Chief Judge;* and GOODRICH and MCLAUGHLIN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed, and the case remanded for proceedings not inconsistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF
Clerk

December 23, 1959